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IN THE

Supreme Court of the United States

October Term, 1958

No. 873

CAMERON IRON WORKS, INC., *Petitioner,*

v.

LODGE NO. 12, DISTRICT NO. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS, *Respondent*

PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals For The Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 30, 1958 (R. 63, App. 1), and judgment upon its petition for rehearing entered August 11, 1958 (R. 81) reversing the judgment of the United States District Court for the Southern District of Texas (R. 38) and remanding the cause to the District Court for further proceedings in accordance with the opinion of the Court of Appeals. The opinion of the Court of Appeals held that arbitration of the discharges

of striking employees can be ordered on suit of their collective bargaining representative even though such discharges are admittedly within the jurisdiction of the National Labor Relations Board. It so held even though the agreement between Petitioner and Respondent settling the strike during which the discharges occurred contained no provision for their arbitration, but provided merely for the reinstatement of striking employees *"lawfully* entitled to reinstatement", and even though the particular provisions of the collective bargaining agreement between Petitioner and Respondent pursuant to which the strike occurred were admittedly not subject to arbitration.

The record certified from the court below will be referred to as R.; the Appendix to this Petition as App.

Opinions Below

The District Court granted Petitioner's motion for summary judgment and entered judgment against Respondent on its action against Petitioner for decree of specific performance compelling arbitration of the strike discharges (R. 38), basing its judgment upon an opinion holding that there was no agreement to arbitrate the strike discharges either in the strike settlement agreement or in the collective bargaining agreement between Petitioner and Respondent (R. 31). The opinion of the Court of Appeals (not yet reported) styled Lodge No. 12, District No. 37, *International Association of Machinists v. Cameron Iron Works, Inc.*, is contained in the Appendix hereto (App. 2, R. 47).

Jurisdiction

The judgment of the Court of Appeals was dated and entered on June 30, 1958 (App. 1, R. 63) and Petitioner's petition for rehearing was denied on August 11, 1958 (R. 81). The jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1254(1).

Questions Presented

1. Does a contract provision to arbitrate differences "as to the meaning, application, or interpretation" of the provisions of a collective bargaining agreement render the admitted jurisdiction of the National Labor Relations Board over the subject matter of the proposed arbitration case non-exclusive; or has the National Labor Relations Act, As Amended, preempted the field of subject matter within the admitted jurisdiction of the National Labor Relations Board, e.g., discharge by an employer of employees for concerted activity in the course of a strike, so as to render the Board's jurisdiction exclusive, thereby depriving a private arbitration board appointed under a collective bargaining agreement of jurisdiction over the same subject matter so as to preclude a District Court from ordering such arbitration under Section 301 of the Labor-Management Relations Act?

2. Does a strike settlement agreement which provides for the reinstatement of those striking employees who are "lawfully entitled to reinstatement", and which contains no provision for the arbitration of strike discharges and no reference to the arbitration provisions of the collective bargaining agreement, repose the determination of the "lawful right to reinstatement" of a discharged striker in

the National Labor Relations Board, which admimittedly has jurisdiction, or does it repose such determination in the private arbitration board provided for in the separate collective bargaining agreement between the discharging employer and the collective bargaining representative of the discharged employees, so as to permit a District Court to order arbitration of the discharges under Section 301 of the Labor-Management Relations Act?

3. Can the discharges of employees for concerted activity during the course of a strike called under an admittedly non-arbitrable wage reopening and strike provision of a collective bargaining agreement be ordered arbitrated by a District Court under Section 301 of the Labor-Management Relations Act when the collective bargaining agreement contains no provisions governing the conduct of the parties during the course of such strike?

Statutes Involved

The statutes under which Petitioner contends that the discharge cases which the Court of Appeals has held to be subject to compulsory arbitration are within the exclusive jurisdiction of the National Labor Relations Board, i.e., Section 7 and portions of Sections 8 and 10 of the National Labor Relations Act, As Amended, are as set forth below:

29 *U.S.C.A.*, Section 157 (61 Stat. 140):

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 *U.S.C.A.*, Section 158 (61 Stat. 140):

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title * * *."

The statute making the jurisdiction of the National Labor Relations Board exclusive over all of the subject matter within the compass of the above-quoted statutory provisions is 29 *U.S.C.A.* 160 (61 Stat. 146):

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be

> affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

Respondent seeks to maintain its suit against Petitioner under authority of Section 301 of the Labor-Management Relations Act, 29 *U.S.C.A.*, Section 185 (61 Stat. 156):

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of the Case

Respondent sued under Section 301 of the Labor-Management Relations Act to compel arbitration of the discharges by Petitioner, an employer engaged in commerce and the production of goods for commerce, of fifteen employees who were advised by Petitioner "that they were discharged for alleged misconduct in connection with the strike recently concluded" (R. 5-8). Respond-

ent and its members went on strike on the question of wages, as permitted under the collective bargaining agreement between Petitioner and Respondent after failure to agree on proposed wage rate modifications after sixty days' wage reopening notice (R. 45A, pg. 32—Art. XX, Sec. 2). Upon termination of the strike, the Petitioner discharged the employees involved for alleged strike misconduct (R. 7). The strike was settled by written memorandum executed by Petitioner and Respondent, which provided in part: "Strikers who are lawfully entitled to reinstatement shall be reinstated to their respective jobs as rapidly as an orderly and economic readjustment of plant operations will permit, and in any event in not more than thirty days from the day the strike is discontinued" (R. 11-12). The strike settlement memorandum contained no provision for arbitration of the question of whether particular strikers "are lawfully entitled to reinstatement" and contained no reference to or incorporation of the arbitration provisions of the separate collective bargaining agreement between Petitioner and Respondent.

The provision of the collective bargaining agreement permitting Respondent to reopen wage rates for negotiation and to strike in the event of failure to reach agreement in sixty days (R. 45A, pg. 32, Art. XX, Sec. 2) admittedly precludes arbitration of the wage dispute and the right to strike because thereof under the grievance procedure and arbitration provisions contained in Articles IV and V of the collective bargaining agreement (R. 45A, pp. 4-8). The collective bargaining agreement is silent on and contains no provision whatever governing the actions and conduct of Petitioner, Respondent, or the

employees during the course of a strike such as the one the Respondent called under the wage-reopening provision (R. 45A).

Respondent's suit to compel Petitioner to arbitrate the strike discharges which it had refused to arbitrate (R. 5) was contested by Petitioner on the ground that there was no agreement to arbitrate the strike discharges either under the strike settlement memorandum, the governing instrument, or under the separate collective bargaining agreement, if it were deemed applicable, and on the further ground that in any event the determination of the issue over the strike discharges was vested exclusively in the National Labor Relations Board (R. 14-20). Both Respondent and Petitioner moved for summary judgment (R. 23-31). Petitioner's motion for summary judgment was granted and judgment was entered for Petitioner (R. 38-39) on a finding by the District Court that there was no agreement to arbitrate the strike discharges either under the strike settlement memorandum or the separate collective bargaining agreement, the Court not reaching the issue of the exclusive jurisdiction of the National Labor Relations Board (R. 31-37).

The Court of Appeals in reversing and remanding the judgment of the District Court has not only held that there was an agreement to arbitrate the strike discharges but has held that such arbitration may be specifically directed even though the subject matter of the proposed arbitration cases is admittedly within the jurisdiction of the National Labor Relations Board (App. 2).

Reasons For Granting The Writ

This Court has not decided or had presented to it for decision the issue of whether arbitration may be judicially compelled of a controversy within the admitted jurisdiction of the National Labor Relations Board. This is an issue of national importance involving the construction of the basic federal statute governing labor relations. The Court of Appeals holding that Section 301 of the Labor-Management Relations Act requires judicial compulsion of arbitration of a controversy concededly within the ambit of Section 10(a) of the National Labor Relations Act, As Amended, squarely presents the accommodation of each of these two vital statutory enactments to the other. The issue presented necessitates comporting judicially directed arbitration of labor controversies under *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912, 1 L.E. 2d 972, and companion cases, with the exclusive jurisdiction of the National Labor Relations Board over such controversies under *Garner v. Teamsters Union*, 346 U.S. 485, 74 S. Ct. 161, 98 L. Ed. 228, and succeeding cases through *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S. Ct. 598, 1 L. Ed. 2d 601, and companion cases. The Court of Appeals resolved the accommodation question by giving predominant effect to Section 301 under Lincoln Mills despite the exclusive jurisdiction provisions of Section 10(a) as construed in Garner through Guss, i.e., by adjudicating in favor of court-compelled arbitration of a controversy concededly within the jurisdiction of the National Labor Relations Board.

The Court of Appeals opinion recognizes that the issue of whether a Federal Court may enforce arbitration under

Section 301 of the Act of a controversy within the jurisdiction of the National Labor Relations Board under Sections 7, 8 and 10(a) of the Act has not been previously decided by this Court, the Court of Appeals opinion stating: "This question has not been raised previously in this Court, nor has it been decided by the Supreme Court" (App. 9, R. 55)

The United States Court of Appeals for the First Circuit in *United Electrical Workers v. Worthington Corp.*, 236 F. 2d 364, made the same declaration:

> "However, there has not yet been a Supreme Court decision involving the jurisdiction of a court or arbitrator over acts constituting a contract violation as well as an unfair labor practice."

It is therefore submitted that the Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court.

In addition, the Court of Appeals has decided this federal question in a way in conflict with the decisions of other United States Courts of Appeals on the same matter. The Court of Appeals recognizes this fact in footnote 14 to its opinion (App. 2, R. 55) in which it states:

> "The following cases held that the jurisdiction of the Board in the field of unfair labor practice would pre-empt state agencies *or private arbitrators* from acting: NLRB v. International Union, 7th Cir. 1952, 194 F. 2d 698; NLRB v. Wagner Iron Works, 7th Cir. 1955, 220 F. 2d 126; McAmis v. Panhandle Eastern Pipe Line Co., Mo. Ct. App. 1954, 273 S.W. 2d 789."

The vital national importance of a proper reconciliation of suits to enforce arbitration under Section 301 with the exclusive jurisdiction of the National Labor Relations Board over controversies within the ambit of the Act was emphasized by Mr. Jerome Fenton, General Counsel of the National Labor Relations Board, in a paper delivered at an Institute at the University of Michigan Law School on August 1, 1958 (*42 LRR* 423, 425) in which he stated:

> "Stated more concretely, the problem is this: As I indicated at the outset, Section 301 confers upon the courts jurisdiction to redress breaches of a collective bargaining agreement. The Supreme Court has recently held that, in the exercise of this jurisdiction, the courts are empowered to decree specific performance of an agreement to arbitrate. But where the contract question also involves unfair labor practice conduct, does this jurisdiction empower the courts to provide a remedy different from, and in conflict with, one which the Board would provide for the same conduct? For example, does Section 301 empower a court specifically to enforce an arbitration award which the Board had found to be contrary to the policies of the National Labor Relations Act, and thus had decreed contrary relief? If it does, the court, under Section 301, may well be in a position where it could impair the effectiveness of Board unfair labor practice decisions, and diminish the heretofore exclusive nature of the Board's jurisdiction. * * *"

Petitioner further urges that the decision of the Court of Appeals that there was an agreement to arbitrate, the strike discharges even though the strike settlement memorandum, the controlling instrument, provided merely for the reinstatement of all striking employees who were "law-

fully entitled to reinstatement" and contained no provision for arbitration or reference to or incorporation of the arbitration provisions of the separate collective bargaining agreement, and even though the separate collective bargaining agreement contained no provisions governing the conduct or actions of the employer, the union, or the employees during the course of a strike, conflicts with the decision of the United States Court of Appeals for the First Circuit in *Local No. 149 of American Federation of Technical Engineers (AFL) v. General Electrical Company*, 250 F. 2d 922, certiorari denied, ____ U.S. ____, 2 L. Ed. 2d 813. The latter case on identical contract language with the present case as to scope of arbitration held that arbitration should not be judicially directed where there was no express contract provision to be interpreted or applied governing the subject matter of the particular controversy.

Petitioner additionally submits that the decision of the Court of Appeals in this case that strike conduct and strike discharges are arbitrable even though the strike to which they were incident and the wage-reopening about which the strike occurred are admittedly not arbitrable is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *International Union, United Automobile Workers v. Benton Harbor Malleable Industries*, 242 F. 2d 536, cert. denied, 355 U.S. 814, and the decision of the same circuit in *Hoover Motor Express Co. v. Teamsters Union*, 217 F. 2d 49, in which it was held that a claimed breach of the no-strike clause of a collective bargaining agreement was not subject to arbitration under the arbitration provisions of such agreement.

Point One

The Court of Appeals has decided erroneously an important question of federal law which this Court has not settled but should determine in holding contrary to other courts of appeals that arbitration may be judicially directed of a controversy admittedly within the jurisdiction of the National Labor Relations Board.

The Respondent's complaint alleges, and it is admitted, that the Petitioner is engaged in interstate commerce and in the production of goods for commerce, within the meaning of the Act (R. 5). The complaint alleges, and it is admitted, that Petitioner discharged the employees involved for alleged misconduct during the course of and in connection with a lawful strike (R. 6-8). Under a long line of decisions of this Court, these allegations would place the controversy beyond the jurisdiction of any state agency or state court and within the exclusive jurisdiction of the National Labor Relations Board. *Garner v. Teamsters Union, supra; Capital Service, Inc. v. National Labor Relations Board*, 347 U.S. 501, 98 L. Ed. 887, 74 S. Ct. 699; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 99 L. Ed. 546, 75 S. Ct. 480; *Building Trades Council v. Kinard Construction Company*, 346 U.S. 932, 98 L. Ed. 423; *Guss v. Utah Labor Relations Board, supra; Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U.S. 20, 1 L. Ed. 2d 613, 77 S. Ct. 604; and *San Diego Building Trades Council v. Garmon*, 353 U.S. 26, 77 S. Ct. 607, 1 L. Ed. 2d 618.

The Court of Appeals opinion holds that the claimed application of this line of cases to the present case "over-

looks the obvious distinction between *contract provisions* and *matters committed exclusively to the Board*". Section 10(a) of the National Labor Relations Act, As Amended, recognizes no such "obvious distinction" when it places remedies established by private "agreement" and remedies established by state "law" on the same basis: "This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise".

The claimed distinction has also been rejected by various decisions by other Courts of Appeal whose decisions conflict with the present decision on the same matter. The United States Court of Appeals for the Ninth Circuit in *National Labor Relations Board v. Walt Disney Productions*, 146 F. 2d 44, held to the contrary of the present decision, stating in part: "Clearly, agreements between private parties cannot restrict the jurisdiction of the Board". As acknowledged in footnote 14 in the Court of Appeals opinion in the instant case, the Seventh United States Court of Appeals has held to the contrary in *National Labor Relations Board v. International Union*, 194 F. 2d 698, and in *National Labor Relations Board v. Wagner Iron Works*, 220 F. 2d 126. In the first case, the Seventh United States Court of Appeals said: "The Board's exclusive function in this field may not be displaced by action before State agencies or by arbitration". In the *Wagner* case, the same court said: "Furthermore, arbitration provisions in a bargaining agreement cannot oust the Board's jurisdiction to prevent unfair labor practices".

The fallacy in the reasoning of the subject opinion is primarily in its failure to distinguish between the *voluntary* arbitration of a controversy within the jurisdiction

of the National Labor Relations Board, in which case the Board may respect the arbitration award or not as it sees fit, and *compulsory* arbitration of such a controversy under court decree. Cf. Board decisions *In Re Speilberg Mfg. Co.*, 112 NLRB No. 139, 36 LRRM 1152, in which the Board decided to observe arbitration awards in strike discharge cases where the parties voluntarily agreed to arbitration of the discharges after they had occurred, and *Wertheimer Stores Corp.*, 107 NLRB 1434, 33 LRRM 1398, in which the Board refused to respect an arbitration award when arbitration was had over the opposition of the individual involved. It is in the court compelled arbitration situation where General Counsel Fenton inquires, supra, how does the Board stand if it does not wish to observe an arbitration award rendered under court decree or ordered enforced by court decree? The question posed spotlights the necessity of exclusive jurisdiction of the Board over a controversy within its compass as against court compelled arbitration of the same controversy. If court compelled arbitration in this case finally bound Respondent by the arbitration award, then the Board would be ousted in a controversy over which it has admitted jurisdiction. If the Respondent was not so bound, then the Respondent would be given two chances to win the same case and Petitioner would be forcibly subjected to two chances of losing. The latter unwholesome result would be comparable to subjecting a citizen to double jeopardy in a criminal case and would in practical effect deny Petitioner both that fair play which is the essence of due process of law and the equal protection of the law.

The Court of Appeals in the present case admits that "the same conduct here involved would constitute a violation of the contract and an unfair labor practice" and

then rejects any meaningless distinction between a contract part and an unfair labor practice part of the same conduct as follows:

> "We think it too technical and obtrusive to attempt a division of the present controversy into a contract part and an unfair labor part. Such a division is merely a play on words. It is better to call the spade and say that enforcement of a contract to arbitrate grievances is different from an adjudication of an unfair labor practice by the National Labor Relations Board. This will prevent the nebulous determination of *what part* is contract and *what part* is unfair labor practice when the *one part* constitutes both". (App. 13).

In substance, then, the Court of Appeals holds that the indivisible "one part" shall be adjudged in arbitration under a decree of specific performance even though the National Labor Relations Board has jurisdiction to and may adjudicate the same "one part" - simply because the proceedings are "different". This Court has repeatedly and sternly rejected any such impingement upon the exclusive jurisdiction of the National Labor Relations Board by state courts or state agencies under any such theory of concurrent jurisdiction. The Court of Appeals decision of which review is here sought decrees an infringement upon the exclusive jurisdiction of the National Labor Relations Board by private arbitration under federal judicial decree which would undoubtedly be denied under identical circumstances to any agency or any court of any sovereign state.

The Court of Appeals states the basis of its holding plainly: "We believe that this decision is required by the teaching of the recent *Lincoln Mills* cases". *Textile Work-*

ers Union v. Lincoln Mills, supra; Goodall-Sanford, Inc. v. United Textile Workers, 353 U.S. 550; *General Electric Co. v. Local Union 205, United Electrical Workers*, 353 U.S. 547. The short and sufficient answer is that the issue of the exclusive jurisdiction of the National Labor Relations Board over the controversy was neither invoked nor involved in any of the *Lincoln Mills* cases. The Court of Appeals opinion admits that "these cases did not concern an issue which was both contracted to be arbitrable and concerned unfair labor practice".

The issue of judicially decreeing arbitration of a controversy within the jurisdiction of the National Labor Relations Board was not mentioned, discussed, decided or, under their facts, even subject to being raised in any of the *Lincoln Mills* cases. As since held by the United States Court of Appeals for the Second Circuit in *A. H. Bull Steamship Co. v. Seafarers' International Union*, 250 F. 2d 326: "The ultimate question in Lincoln Mills was whether or not Congress by Section 301 of the Taft-Hartley Act authorized the federal courts to compel arbitration".

The *Lincoln Mills* cases required no decision running counter, as the current decision does, to the underlying basis and reasoning of this Court's long line of pre-emption cases. At the least, as stated by the Massachusetts Supreme Judicial Court in the case of *Post Publishing Co. v. Cort*, 134 N.E. 2d 431: "Decisions of the Supreme Court of the United States have not yet passed upon the jurisdiction of an arbitrator to adjudicate a contract violation which is also an unfair labor practice. 69 *Harv. L. Rev.* 726".

Point Two

The holding of the Court of Appeals that lawful right of strikers to reinstatement should be arbitrated instead of adjudicated by the National Labor Relations Board when the strike settlement agreement contained no provision for arbitration is in conflict with the decision of another court of appeals.

The special agreement settling the strike because of which the discharges occurred provided only for the reinstatement of "strikers who are lawfully entitled to reinstatement". It contained no provision whatever for arbitration of the issue of whether particular strikers were "lawfully entitled to reinstatement". Although it contained references to the collective bargaining agreement in other connections, it contained no reference to and incorporated none of the arbitration provisions of the collective bargaining agreement in connection with determining the issue of "strikers who are lawfully entitled to reinstatement". (See R. 11-12). The Court of Appeals nevertheless holds that "the question of which strikers are 'lawfully entitled to reinstatement' must be considered an arbitrable matter rather than left to the unilateral determination of the Company * * * " (App. 8, R. 54).

The plain error in this holding by the court below is that the parties in the governing instrument, i.e., the strike settlement agreement, repose the determination of the issue neither in arbitration nor in the unilateral determination of the Company. It provided only for the reinstatement of those strikers who were *lawfully* entitled to reinstatement. It therefore provided for determination of the issue by the only applicable *law*, the National Labor

Relations Act, by the only agency empowered to make such a determination, the National Labor Relations Board. The parties expressly agreed to limit reinstatement to those having a *lawful right* and did not provide for any *contract right* of reinstatement. Only the National Labor Relations Board can adjudicate the former and a private arbitration board could do nothing more than decide the latter—for which there is no contract provision. The parties by their governing agreement left the determination of the reinstatement right of discharged strikers to the National Labor Relations Board, the agency having exclusive jurisdiction under the law to make such determination. Under the most elementary rules of construction, if the parties had intended to agree to arbitrate these reinstatement rights, they would have done so either by express provision in the strike settlement agreement or by reference to and incorporation of the arbitration provisions in the separate collective bargaining agreement. The parties in their strike settlement agreement did neither. In connection with adjustments in contract wage rates and contract provisions for further wage reopenings, the parties made express reference to the collective bargaining agreement in their strike settlement agreement. In connection with the reinstatement rights of discharged strikers, they did not. They left this issue to determination under the National Labor Relations Act by the National Labor Relations Board.

In finding an agreement to arbitrate the strike discharges in the absence of any provision therefor in the strike settlement memorandum, the Court of Appeals rendered a decision in conflict with the decision of the United States Court of Appeals for the First Circuit in *Local No. 149 of American Federation of Technical Engineers (AFL)*

v. General Electric Company, supra, which holds that arbitration is not to be decreed unless there is a clear, definite and unambiguous provision to arbitrate the specific controversy.

Point Three

The decision decreeing arbitration of strike discharges occurring under an admittedly non-arbitrable wage reopening and strike provision in a collective bargaining agreement containing no provision governing the conduct of the parties during the course of a strike is in conflict with the decisions of other courts of appeals.

The Respondent struck under a specific provision of the collective bargaining agreement permitting a wage reopening and a strike in the event of failure to reach agreement on wage adjustments in sixty days (R. 6, 45A, Pg. 32). The collective bargaining agreement contains no provision whatever governing or referring to the conduct and the actions of the employer, the union or the employees during the course of the strike but is utterly silent with reference to the strike. (R. 45A). The wage reopening, differences over wage adjustments and a strike over wage disagreement are all admittedly non-arbitrable. Nevertheless, the Court of Appeals holds incidents to and parts of the non-arbitrable wage controversy and non-arbitrable strike to be arbitrable despite the total absence of provisions governing strike actions or strike conduct.

Petitioner submits that this portion of the decision of the court below is also in conflict with the decision of the United States Court of Appeals for the First Circuit

in *Local No. 149 of American Federation of Technical Engineers (AFL) v. General Electric Company, supra.* The collective bargaining agreements in the two cases contain almost identical language on the scope of arbitration. In our case arbitration is limited to "any difference" between the parties "as to the meaning, application, or interpretation of the provisions" of the agreement (R. 45A, Pgs. 4-8). In the *Technical Engineers* case arbitration is limited almost identically to "any grievance which involves the interpretation or application" of the agreement. In the *Technical Engineers* case the Court of Appeals held that a grievance claiming that employees were improperly classified and that the jobs being performed by them came within a higher grade and a higher rate among those enumerated in the contract than the grade and rate at which they were being classified and paid was not arbitrable because: "There is no language in the collective bargaining agreement to be interpreted and applied for the purpose of determining whether the duties performed by a particular employee entitle him to be classified in any particular 'grade', carrying with it a corresponding wage rate". Likewise, in our case "there is no language in the collective bargaining agreement to be interpreted and applied" governing the reinstatement rights of employees discharged during the course of a strike conducted under a non-arbitrable wage reopening and strike provision since there is no provision whatever governing the actions, conduct and rights of parties during the course of such strike.

The Court of Appeals opinion concedes that a case is not arbitrable "where the controversy or grievance concerns violation of a 'no-strike clause'" (App. 8, R. 53) but proceeds to hold that the discharges of strikers are arbitrable even though the very contract provision under

which they struck is concededly non-arbitrable! How can an incident to and a part of this non-arbitrable strike, i.e., the affected employees' strike conduct or mis-conduct and their proper or wrongful discharge by Petitioner, be held arbitrable when the only contract clause under which they could strike is held to be non-arbitrable? Petitioner submits that this portion of the opinion of the court below is in conflict with the decisions of the United States Court of Appeals for the Sixth Circuit in *International Union, United Automobile Workers v. Benton Harbor Malleable Industries, supra*, and *Hoover Motor Express Co. v. Teamsters, supra;* with the decision of the Court of Appeals for the Seventh Circuit in *Cuneo Press v. Kokomo Paper Handlers' Union*, 235 F. 2d 108; with the decision of the Second Circuit Court of Appeals in *Markel Electric Products v. United Electrical Workers*, 202 F. 2d 435; and with the decision of the Fourth Circuit Court of Appeals in *United Electrical Workers v. Miller Metal Products*, 215 F. 2d 221. These cases and others all reject the arbitrability of grievances or controversies arising under a no-strike clause of a collective bargaining agreement. No different rule is logical or tenable for controversies or disputes arising as a part of or incident to a non-arbitrable wage re-opening and strike permissive provision.

As stated in *McCarroll v. Los Angeles County District Council of Carpenters*, 315 P. 2d 322, by the Supreme Court of California, in which certiorari has been denied by this Court, 2 L. Ed. 2d 415, ____ U.S. ____: "The grievance and arbitration procedure assumes that work goes on. Resort to the procedure is designed to avoid the necessity of a strike, not to adjudicate a strike once it has occurred, and the purpose of the procedure limits its applicability".

Conclusion

The questions presented for review are of vital, national importance to the future administration of the basic federal statute governing labor relations. This Court has not expressly decided the important question under the federal statute of whether the exclusive jurisdiction of the National Labor Relations Board over a controversy which could not be infringed upon by a state court or a state agency may nevertheless be impinged upon by private arbitration judicially directed in a suit under Section 301 of the federal statute. This question should be settled—particularly since the decision of the Court of Appeals is admittedly in conflict with the decisions on the same matter by the Courts of Appeals of other circuits and is seemingly decided in a way probably not in accord with the applicable decisions of this Court.

Further, the processes of voluntary arbitration of labor disputes favored by federal policy will not be promoted by judicial compulsion of arbitration of controversies which the parties have not agreed to arbitrate by clear and unambiguous contract clauses. The holdings of the court below that arbitration should be decreed of the "lawful right to reinstatement" which the parties have seemingly left to determination under the law by the National Labor Relations Board and that arbitration should be decreed of strike discharges which are incident to and a part of a strike called under a concededly non-arbitrable wage reopening and strike provision will not promote the federal policy favoring voluntary arbitration of labor disputes, but will make parties exceedingly cautious and overly chary concerning the meticulous language of their arbitration provisions. In addition, such decisions seem

to be in conflict with decisions of Courts of Appeals for other circuits.

It is accordingly urged that a writ of certiorari to review the judgment of the court below should be granted.

Respectfully submitted,

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APPENDIX

JUDGMENT

Extract from the Minutes of June 30, 1958.

LODGE No. 12, DISTRICT No. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS,

No. 17025. versus

CAMERON IRON WORKS, INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Cameron Iron Works, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, concurs in the result."

OPINION

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17025

LODGE No. 12, DISTRICT No. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS, Appellant,

versus

CAMERON IRON WORKS, INC., Appellee

Appeal from the United States District Court for the Southern District of Texas

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(June 30, 1958)

Before HUTCHESON, Chief Judge, and RIVES and CAMERON, Circuit Judges.

RIVES, Circuit Judge: The appellant and the appellee are parties to a collective bargaining contract within the purview of the National Labor Relations Act.[1] The contract was effective for a two-year period from June 1, 1956, through May 31, 1958, and included a renewal provision. Under the terms of the contract, the right to employ and discharge employees, while vested exclusively in the Company, is subject to certain limitations, one being that a discharge may constitute a "griev-

[1] 29 U.S.C.A. §151, et seq.

ance." A "grievance procedure" is specified for *any* difference arising between the Company and any employee as to the meaning, application or interpretation of the contract; an unsettled grievance may be submitted to arbitration. Pertaining to arbitration, Article V, Section 2 of the contract states:

> "The Board of Arbitration shall render a decision within fifteen (15) days from the date the hearing is completed. The terms and conditions of settlement shall be within the sole discretion of the Board and the decision of a majority of the Board shall be final and binding on the parties; provided, however, the Board shall have no authority to violate, contravene, disregard or supplement the terms of this agreement."

The contract contains a "wage reopening clause" which states that the question of wages can be reopened by either party once a year upon giving thirty days' written notice to the other, and if no agreement is reached within sixty days after the notice, any strike limitation on the Union terminates.

The appellant reopened the question of wages under the "wage reopening clause" and, after reaching no agreement, effected a strike on April 29, 1957. The strike ended on June 8, 1957, with a settlement of a three cent per hour wage increase. The settlement agreement was in the form of a letter from the Company accepted by the appellant. The last paragraph of this letter states:

> "*Strikers who are lawfully entitled to reinstatement* shall be reinstated to their respective jobs as rapidly as an orderly and economic readjust-

> ment of plant operations will permit, and in any event in not more than thirty (30) days from the date the strike is discontinued. Reinstatement notices will be mailed to the last known address of striking employees. Employees who do not report for duty, or submit a valid reason for not reporting, within five (5) days after reinstatement notice is mailed shall forfeit any right to reinstatement. These provisions shall not in any way prejudice the right of the company to reduce the working force." (Emphasis supplied.)

Upon the termination of the strike, fifteen employees, members of appellant, were discharged or were refused reinstatement because of "strike misconduct."

Appellant demanded arbitration of the discharge of or refusal to reinstate the fifteen employees and, upon refusal by the Company, brought this action to compel arbitration under the contract, invoking the jurisdiction of the federal courts under section 301 of the Act.[2] The trial judge granted summary judgment for the Company under Rule 56, Federal Rules of Civil Procedure.

The Company defends this action upon two grounds: first, that the arbitration provisions of the contract are in no way applicable to the matter of discharging or refusing to reinstate the fifteen employees released for misconduct during the strike; second, if the arbitration provisions are applicable, the matter of discharge or reinstatement is within the exclusive jurisdiction of the National Labor Relations Board which renders an ar-

§185.

[2] Title III, Section 301, National Labor Relations Act, 29 U.S.C.A.

bitration agreement on this matter unenforceable. The trial court held the first defense good and declined to consider the second. It reasoned that the parties intended by the contract to submit grievances to arbitration only where the *operations of the Company were normal;* that the employees were not in the employ of the Company since the strike precluded normal operations; and that the language of the Settlement Agreement implied that the Company should unilaterally decide who was "lawfully entitled to reinstatement." The pertinent portion of the trial judge's memorandum opinion is printed in the margin.[3]

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[3] " other than is contained in such quoted Section [the section giving power to the Company to employ and discharge], there is nothing in the agreement that in so many words prohibits Company from discharging such employees. But the spirit of the Agreement seems to be that restrictions are intended, in that under Section 13, Article XII, of the Agreement, if an employee is discharged, the cause of his discharge must be made known to him. Also in that under Articles IV and V, the discharge of an employee may constitute a 'grievance' covered by the 'Grievance Procedure' and by the provisions (Articles IV and V) covering Arbitration.

"It is probably true that under the normal operations under such Agreement had any of the persons employed thereunder by Company been discharged by Company, such discharge would have been covered by the Grievance Procedure and Arbitration provisions in Articles IV and V.

"But operations were not normal. There were negotiations between Union and Company for higher wages for such employees and there were disagreements, followed by a strike of such employees. For more than forty (40) days, the persons employed under the Agreement did no work for Company, were paid no wages by Company, and were not subject to the orders of Company—indeed, they were not in the employ of Company. Company did not want to re-employ some of such persons because of alleged misconduct by them during the strike. So situated, the parties executed the Settlement Memorandum, increasing wages and ending the strike. In such Settlement Memorandum, former employees are referred to as 'strikers', 'striking employees', and

Since we disagree with the district court's opinion that no arbitration would lie to the matter at bar, we must also decide the issue of pre-emption raised by the appellee.

I. Was the Dispute Arbitrable?

Initially, the appellant earnestly contends that the question of arbitrability should be determined by the arbitration board in this case, saying that the lower court should not have decided the issue of arbitrability in view of the contract provision that "any grievance" could be arbitrated. While there is much to say in favor of appellant's argument,[4] the courts have, with practical uniformity, held the question of arbitrability to be an issue for the courts—that is, the courts decide if the particular grievance is arbitrable under the terms of the col-

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'employees', and presumably because the misconduct charged against some of them was very seriously regarded by Company, it is provided that only 'Strikers who are lawfully entitled to reinstatement shall be reinstated.'

"There is nothing said in the Settlement Memorandum about how the matter of who was guilty of misconduct and who was 'lawfully' entitled to be reinstated should be determined. There is nothing said about arbitrating the matter either under the Agreement or otherwise. As stated, it may be that it was intended that Company should decide the matter.

"I do not believe the Agreement and the Settlement Memorandum, when construed together or separately, mean that the matter is to be arbitrated under the provisions of the Agreement."

[4] See 1951 Majority Report, Committee on Improvement of Administration of Union-Employer Contracts, Section of Labor Relation Law, American Bar Association; Justin, **Arbitrability and the Arbitrator's Jurisdiction, MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS** (1956); Davey, **Discussion, Arbitrability and the Arbitrator's Jurisdiction, MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS** (1956); Pirsig, **Some Comments on Arbitration Legislation and the Uniform Act**, 10 **VAN-**

lective bargaining contract.[5] This is true even where the contract specifies that *any* controversy relating to the meaning or interpretation or application of the contract is arbitrable.[6] Perhaps, if the contract expresses that the arbitrators will decide arbitrability, the courts would refrain from a decision.[7] We will not delve into the intricacies or the merits of either side of this problem.

The general policy considerations of promoting harmonious interplay and propitious relations between labor and management, which will achieve industrial peace, have been given their full weight in the interpretation of collective bargaining contracts. With this search for true tranquillity in the industrial world ever in mind, the courts have crystalized from the supersaturation of liti-

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DERBILT L. REV. 685 (1957); Cox, **Some Lawyers' Problems in Grievance Arbitration, 10 MINN. L. REV.** 41 (1955); Clifton, **Arbitration and Arbitrability,** 3d Annual Conf. on Labor N.Y.U. 187 (1950). See also many articles in the Labor Arbitration Reports published by the Bureau of National Affairs, arbitration cases found in the American Labor Arbitration Awards published by Prentice Hall, and material in The Arbitration Journal, published by the American Arbitration Association.

[5] See Annotation 24 A.L.R. 2d 752, 766.

[6] E.g., Engineers Ass'n v. Sperry Gyroscope Co., etc., 2d Cir. 1957, 251 F. 2d 133; Local No. 149, etc. v. General Electric Company, 1st Cir. 1957, 250 F. 2d 922; Goodall-Sanford, Inc. v. United Textile Workers, 1st Cir. 1956, 233 F. 2d 104; Wilson Brothers v. Textile Workers Union, S.D. N.Y. 1954, 132 F. Supp. 163; Textile Workers Union v. American Thread Co., D. Mass. 1953, 113 F. Supp. 137; Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, 382 Pa. 326, 115 A. 2d 633, cert. denied, 350 U.S. 843; McCarroll v. Los Angeles County District Counsel of Carpenters, Cal. 1957, 315 P. 2d 322.

[7] See dicta in International Union, etc. v. Benton Harbor Mal Ind., 6th Cir. 1957, 242 F. 2d 536; Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, note 6 supra; McCarroll

gation since 1947 several "rules of construction" in the interpretation of collective bargaining contracts to arbitrate. We consider the general rule to be that a dispute between labor and management is arbitrable where the dispute is specifically contracted to be arbitrable or generally where the contract expresses a broad arbitration policy, i.e., a general arbitration clause;[8] but controversies are not arbitrable where the controversy in question is specifically excluded, where because of a listing of many arbitrable incidences the instant controversy is impliedly excluded,[9] and where the controversy or grievance concerns violation of a "no strike clause."[10]

In the case at bar, not only does the contract specifically state that grievances arising from discharges may be arbitrated but it also has the general provision that "any difference" arising "between the Company and any

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v. Los Angeles County District Council of Carpenters, note 6 supra. However, in Monument Mills v. Textile Workers Union, D. Mass. 1957, 152 F. Supp. 429, the court held that arbitrability was for the arbitrators in view of the language of the collective bargaining contract.

[8] American Lava Corp. v. Local Union No. 222, etc., 6th Cir. 1958, 259 F. 2d 137; Goodall-Sanford, Inc. v. United Textile Workers, 1st Cir. 1956, 233 F. 2d 104; Wilson Bros. v. Textile Workers, D.C. N.Y. 1954, 132 F. Supp. 163.

[9] Local No. 149, etc. v. General Electric Company, 1st Cir. 1957, 250 F. 2d 922; United Furniture Workers v. Little Rock Furniture Mfg. Co., E.D. Ark. 1957, 148 F. Supp. 129.

[10] International Union, etc. v. Benton Harbor Mal. Ind., 6th Cir. 1957, 242 F. 2d 536; Cuneo Press v. Kokomo Paper Handlers' Union No. 34, 7th Cir. 1956, 235 F. 2d 108; Hoover Motor Exp. Co. v. Teamsters, Chauffeurs, etc., 6th Cir. 1954, 217 F. 2d 49; Markel Electric Prod. v. United Electrical, R. & M. Wkrs., 2d Cir. 1953, 202 F. 2d 435; United Electrical, R. & M. Wkrs. v. Miller Metal Prod., 4th Cir. 1954, 215 F. 2d 221.

employee as to the meaning, application or interpretation of the provisions" of the contract may constitute a grievance and, if not settled, may be arbitrated. We cannot agree with the trial court that the parties contemplated the contract to cover only "normal operations free from strike," nor can we agree that the striking employees were not in the employ of the Company.[11] The contract implies a broader, even an inclusive, coverage. The preamble of the contract states:

> "Article I—Preamble
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> "The intent and purpose of the parties hereto is that this agreement will promote, improve, and maintain industrial economic and harmonious relations between the Union and the Company and to set forth herein the basic agreement covering rates of pay, hours of work, and conditions of employment to be observed between the Company and its employees."

We cannot interpret the contract to say that grievances arising from a discharge of employees for strike misconduct, where the employees were striking under the terms of the contract, would be impliedly excluded from arbitration. Neither did the settlement memorandum impliedly exclude from arbitration any arbitrable matter in the contract. The question of which strikers are "lawfully entitled to reinstatement" must be considered an arbitrable matter rather than left to the unilateral determination of the Company in order to preserve the

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[11] Section 2(3) of the Act [29 U.S.C.A. §152(3)]; N.L.R.B. v. Mackay Radio & Telegraph Co., 1938, 304 U.S. 333, 345; N.L.R.B. v. U. S. Cold Storage Corp., 5th Cir. 1953, 203 F. 2d 924, 927.

terms of the contract relating to seniority, retirement, etc., and to carry out its general intent and purpose.

II. Exclusiveness of Jurisdiction

The second ground of defense presents the question of whether parties to a collective bargaining agreement may contract to submit matters involving unfair labor practices[12] to private arbitrators with such contract enforceable by the federal courts under section 301 of the Act, or whether all controversies concerning unfair labor practices are within the exclusive jurisdiction of the National Labor Relations Board which pre-empts the federal courts from acquiring jurisdiction over a contract violation which happens also to be an unfair labor practice. This question has not been raised previously in this Court, nor has it been decided by the Supreme Court.

The appellee asserts that, since the discharges were made because of *union activity*—protected or unprotected—which presents the question of unfair labor practice vel non,[13] and since the exclusive jurisdiction of the Board pre-empts state courts and agencies from deciding issues involving such unfair labor practices,[14] certainly

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[12] Section 8 of the Act [29 U.S.C.A. §158].

[13] Appellee's contentions are generally that in discharging the fifteen employees the appellee is either guilty of unfair labor practice under section 8(a)(1) or (3) [29 U.S.C.A. §158(a)(1) or (3)], in which event the employees' strike activities would be "protected," or the appellee is not guilty of unfair labor practice, in which event the strike conduct is an "unprotected" activity; and in either event, the N.L.R.B. has exclusive jurisdiction to decide.

[14] The following cases held that the jurisdiction of the Board in the field of unfair labor practice would pre-empt state agencies or private arbitrators from acting: N.L.R.B. v. International Union,

the parties cannot by contract give to private arbitrators more jurisdiction than is afforded to state courts. However, the appellee overlooks the obvious distinction between *contract provisions* and *matters committed exclusively to the Board*. If an arbitrable contract violation encompasses an unfair labor practice, the majority of the courts have held that arbitration is proper to decide all matters not included in the pre-emptive area. Likewise, the better-reasoned cases hold that even where the aggrieved inci[illegible]at or act constitutes both a contract violation and an unfair labor practice, particularly concerning a substantive contract right such as employment or pay, the federal district courts will not be deprived of jurisdiction to grant relief as to the breach of contract, the other aspect being left to the Board.[15]

7th Cir. 1952, 194 F. 2d 698; N.L.R.B. v. Wagner Iron Works, 7th Cir. 1955, 220 F. 2d 126; McAmis v. Panhandle Eastern Pipe Line Co., Mo. Ct. App. 1954, 273 S.W. 2d 789.

Where union activity violated state laws and was also within the scope of the National Labor Relations Act, state enforcement was held to be void. Garner v. Teamsters Union, 1953, 346 U.S. 485; Capital Service, Inc. v. N.L.R.B., 1954, 347 U.S. 501; Weber v. Anheuser-Bush, Inc., 1955, 348 U.S. 468.

[15] See Independent Petroleum Workers, etc. v. Esso Standard Oil Co., 3d Cir. 1956, 223 F. 2d 401; United Electric, etc., Local 259 v. Worthington Corporation, 1st Cir. 1956, 236 F. 2d 364. Note the late Chief Judge Parker's opinion in Textile Workers v. Arista Mills Co., 4th Cir. 1951, 193 F. 2d 529, 533-534, where he stated:

"We think it clear that parties may not by including a provision against unfair labor practices in a bargaining agreement vest in the courts jurisdiction to deal with matters which Congress has placed within the exclusive jurisdiction of the National Labor Relations Board. Where, however, substantive rights with respect to such matters as positions or pay are created by bargaining agreements, there is no reason why the courts may not enforce them even though the breach of contract with regard thereto may constitute also an unfair labor practice within the meaning of the act. As said by Chief Judge Jones in Reed v. Fawick

However, in this case, we must go one step further because substantially the same conduct here involved would constitute a violation of the contract and an unfair labor practice. The distinguishing point is that, while an act may be both an arbitrable contract violation *and* an unfair labor practice, a "breach of contract *is not* an unfair labor practice"; the former is enforced by the courts, the latter by the Board;[16] the former gives to private parties a remedy, the latter uses a private right

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Airflex Co., D.C., 86 F. Supp. 822, 823-824: 'It is clear that this Court has no jurisdiction to entertain a petition for relief as to unfair labor practices. Whether acts which constitute unfair labor practices under the statute have been committed by an employer and, if so, what remedies will be prescribed for the employees are matters within the exclusive jurisdiction of the Board.

"'If, however, a particular act is the subject of an agreement between employer and union and the union sues for breach of that contract, the District Court could not be ousted of its jurisdiction to hear and determine the case merely because the act constituted not only breach of contract but also an unfair labor practice.'

"Our conclusion on the first question is that, while there was no jurisdiction in the court to grant relief with respect to any refusal to bargain, which, if established, would be an unfair labor practice within the exclusive jurisdiction of the Labor Board, Amazon Cotton Mill Co. v. Textile Workers Union of America, supra, the court did have jurisdiction to grant relief with respect to the alleged breaches of contract relating to refusal to accord to striking employees the status and rights to which they were entitled under the bargaining agreement."

[16] See Association of Westinghouse Salaried Employees v. Westinghouse Electric Co., 1955, 348 U.S. 437, where the court stated at footnote 2, page 443: "It is significant, however, that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42."

to effectuate the declared policies of the Act;[17] the former gives a certainty of decision, the latter leaves decision discretionary.[18] Section 10 (a) of the Act[19] states that the power of the Board over unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Will the submission of a contract violation, which is also an unfair labor practice, to arbitration "affect" this power of the Board? Certainly not. Since the Board's power is plenary in all respects, "neither the existence of an agreement to arbitrate nor a rendered award can preclude the Board from exercising its statutory jurisdiction."[20] But certainly an award or an agreement to arbitrate may serve to temporarily assuage the aggrieved party and afford validity to contract terms (even including unfair labor practices) until a final disposition of the matter of unfair labor practice be made by the Board. Even though the Board is not bound by an arbitration award, it may find that compliance with the award is not violative of the Act,[21] or it may even, in the exercise of its discretionary power, decline action because an award has been made or arbitration is possible.[22]

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[17] E.g., N.L.R.B. v. Olaa Sugar Co., 9th Cir. 1957, 242 F. 2d 714; Superior Engraving Co. v. N.L.R.B., 7th Cir. 1950, 183 F. 2d 783, cert. denied, 340 U.S. 930; N.L.R.B. v. Hudson Motor Car Co., 6th Cir. 1943, 136 F. 2d 385.

[18] E.g., N.L.R.B. v. Olaa Sugar Co., note 17, supra; N.L.R.B. v. Stoller, 9th Cir. 1952, 207 F. 2d 305; N.L.R.B. v. Swinterton, 9th Cir. 1953, 202 F. 2d 511, cert. denied, 346 U.S. 814.

[19] 29 U.S.C.A. §160(a).

[20] United Electrical R. & M. Wkrs. v. Worthington Corp., 1st Cir. 1956, 236 F. 2d 364, 368. See also N.L.R.B. v. Wagner-Iron Works, etc., note 14, supra.

[21] Spielberg Manufacturing Co., 112 N.L.R.B. 1080 (1955).

[22] See Spielberg Manufacturing Co., supra note 21; Crown Zellerbach Corp., 95 N.L.R.B. 753 (1951); Note, 69 HARV. L. REV.

Such a practice may be at least a partial answer to the commonly known fact that the National Labor Relations Board has presented to it such a multitude of complaints and grievances that decisions are slow in forthcoming and many cases are refused review.[23] State tribunals have no jurisdiction in many areas of unfair labor practices even though the Board, because of its overflowing docket, has voluntarily relinquished jurisdiction but failed to cede jurisdiction to a state agency.[24] But "we cannot believe that Congress intended to create a no man's land where voluntary arbitration is barred and the National Labor Relations Board may be too overburdened to enter."[25] Certainly, if an otherwise arbitrable controversy happens also to be an unfair labor practice, the parties should not be forced to abandon their contract right and be relegated "to the slow and creaking procedure which, like a wounded snake, has dragged its slow length along, sans bargaining, sans labor peace, sans everything but pride of opinion, ill temper and frustration."[26] We think it too technical and obtrusive to attempt a division of the present controversy into a contract part and an unfair labor part. Such a division is merely a play on words. It is better to call the spade and say that enforcement of a contract to arbitrate grievances is different from an adjudication of

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725, 731-36 (1956). As cited in United Electrical, R. & M. Wkrs. v. Worthington Corp., 1st Cir. 1956, 236 F. 2d 361, 365.

[23] See Note, 69 HARV. L. REV. 725, 729, et seq.

[24] See Guss v. Utah Labor Board, 1957, 353 U.S. 1; Meat Cutters v. Fairlawn Meats, 1957, 353 U.S. 20; San Diego Unions v. Garmon, 1957, 353 U.S. 26.

[25] As stated in Post Publishing Co. v. Cort. Mass., 131 N.E. 2d 431.

[26] N.L.R.B. v. Roscoe Skipper, Inc., 5th Cir. 1954, 213 F. 2d 703, per Chief Judge Hutcheson in footnote 1, page 704.

an unfair labor practice by the National Labor Relations Board. This will prevent the nebulous determination of *what part* is contract and *what part* is unfair labor practice when the *one part* constitutes both.

We believe that this decision is required by the teaching of the recent *Lincoln Mills* cases.[27] While these cases did not concern an issue which was both contracted to be arbitrable and concerned unfair labor practice, they did establish two broad principles: first, that the United States district courts have the unequivocal statutory power to decree specific performance of collective bargaining contracts to arbitrate; and, second, that private arbitration in the labor-mangaement field is to be afforded broad liberalities. In this connection, the Supreme Court stated at 353 U.S. 455, 456, 457:

> "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.
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> * * *
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> "It seems, therefore, clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule, dis-

[27] Textile Workers Union v. Lincoln Mills, 1957, 353 U.S. 448; Goodall-Sanford, Inc. v. United Textile Workers, 1957, 353 U.S. 550; General Electric Co. v. Local Union 205, United Electrical Workers, 1957, 353 U.S. 547. Cf. The Item Co. v. New Orleans Newspaper Guild, 5th Cir. m/s. No. 17129, decided June 26, 1958.

cussed in *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, against enforcement of executory agreements to arbitrate. We would undercut the Act and defeat its policy if we read §301 narrowly as only conferring jurisdiction over labor organizations.

"The question then is, what is the substantive law to be applied in suits under §301 (a)? We conclude that the substantive law to apply in suits under §301 (a) is federal law, which the courts must fashion from the policy of our national labor laws. See Mendelsohn, Enforceability of Arbitration Agreements Under Taft-Hartley Section 301, 66 Yale L.J. 167. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandate. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. See *Board of Commissioners v. United States*, 308 U.S. 343, 351. Federal interpretation of the federal law will govern, not the state law. Cf. *Jerome v. United States*, 318 U.S. 101, 104. But state law if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy. See *Board of Commissioners v. United States*, *supra*, at 351-352. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights."

Textile Workers v. Lincoln Mills, 1957, 353 U.S. 448, 455-57.

"*The range of judicial inventiveness will be determined by the nature of the problem.*" Within the spirit of the *Lincoln Mills* cases, and consonnant with other well reasoned decisions, the fact that the conduct here involved may constitute an unfair labor practice will not prevent it from being also an arbitrable contract violation.

REVERSED AND REMANDED

CAMERON, Circuit Judge: I concur in the result.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana